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No. 06-__

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a Secured Creditor May Refuse to Release Its Liens Even After Repayment? This novel question was published by counsel for Citizens Bank of Massachusetts ("Citizens") in the May, 1997 Edition of *The Bankruptcy Strategist* * * * citing therein Petitioner Bahig F. Bishay ("Bishay") as the first test-case to said experiment. This novelty became the law of the case *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96). [Pet. App. 11a-14a].

II. Whether a confirmed plan of reorganization: (a) should have been considered by the below courts to have been a binding "*contract*" between Bishay as debtor, on one hand, and Citizens as creditor, on the other hand * * * particularly since Citizens drafted the confirmed plan at issue; (b) whether Citizens breached said contract; and (c) whether Bishay should have been permitted to reap the fruits of the contract at issue, which, among other things, empowered Bishay to challenge the law Citizens managed to conjure-up in the bankruptcy court case *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 * * * a precedent that is contrary to public policy and fair lending practices * * * and its architecture is potentially detrimental to millions of secured-loan borrowers * * * as cited above? [Pet. App. 1a-10a].

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bahig Bishay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-4a), which, in essence, sanctioned earlier rulings made by various state and federal courts that prevented Bishay from challenging the lender's refusal to release its liens on Bishay's real property even after the lender received 100% repayment of the outstanding debt, including interest, fees and costs as of the date of the repayment, *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96). [Pet. App. 11a-14a].

The United States Appeals Court for the First Circuit mistakenly concluded that Bishay was attempting to get a second bite at the same apple but, in fact, Bishay never had his first bite as explained herein.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 1123(b)(3) provides in relevant part:

> [A] plan may * * * provide for—
>
> (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or
>
> (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest.

STATEMENT OF THE CASE

It was Citizens' novel question presented herein (Question-I above): "*May a Secured Lender Refuse to Release Its Liens Even After Repayment*", which drove Bishay to bankruptcy in 1995 and kept him in bankruptcy for five years, notwithstanding that Bishay was perfectly solvent with more than $20.0 million in assets when he sought protection only to stave off over-aggressive collection tactics launched by Citizens immediately following its acquisition of Neworld Bank, which included a substantial loan portfolio. The Bishay loan balance at the time this controversy erupted was approximately $1.5 million, which was secured by approximately $20.0 million in assets Bishay pledged to Neworld as security for the loan at issue. Despite Bishay's offer to repay 100% of his $1.5 loan balance, plus interest, fees and costs as of the date of the repayment, in the summer of 1995 (prior to Bishay's bankruptcy filing) Citizens informed Bishay that unless

he was willing to execute a "general release", in addition to the full repayment of the loan at issue, Citizens was not going to release its liens on all of Bishay's assets because it decided to hold said assets, indefinitely, to fund its future, hypothetical defense costs in connection with any claims Bishay asserted, prospectively, against Citizens, its officers and its owner (currently the Royal Bank of Scotland). Bishay advised Citizens that such demand bordered on racketeering; was at stark contrast with public policy; and should not have endured for one day. Believing that the system ought to protect Bishay through a temporary Chapter 11 bankruptcy filing to allow Bishay to pay all of his creditors, including Citizens, 100% of his outstanding debts in 1995, at the same time to stave off Citizens' over-aggressive practices, regrettably, however, the system failed Bishay as Citizens managed to sway the bankruptcy court to allow it to retain its liens on Bishay's assets, even after full repayment was made in 1996 in the bankruptcy court. Citizens then published its article listed above in Question-I. Bishay, on the other hand, explained to Citizens why he was unwilling to execute the "general release" Citizens insisted upon as a prerequisite to releasing its liens, which was in addition to 100% repayment of the loan at issue. This, Bishay explained to Citizens, was due to his uncertainty of the exact amount of quantifiable damages he and his business had suffered after Bishay had notified his investors in connection with a then pending Initial Public Offering ("IPO") that he had been faced with protracted litigation with Citizens. Needless to say, the IPO efforts were immediately halted as result of this epic. The confirmed plan of reorganization allowed Bishay to substitute Citizens' liens with $500,000 in cash, above and beyond the total balance owed and paid to Citizens—which may, in due course, be determined by this Court to have been uncon-

stitutional on its face. The plan of reorganization at issue was drafted by Citizens and stated as follows:

> *The Debtors' estate may retain and, by its duly authorized representative(s) settle, release or prosecute*[1]*, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims"). However, the Alleged Claims, until and unless reduced by Final Order to a judgment against Citizens, shall not reduce, delay or otherwise interfere with the timely and satisfaction of Citizens' Class One Claim in accordance with this Plan. In addition, until Citizens' actually receives (in form and substance reasonably acceptable to it) a release from (and evidence of dismissal with prejudice of) all Alleged Claims, Citizens shall retain its lien on all Estate Assets not disposed of in accordance with this Plan as security for Citizens' contractual right to reimbursement from the Debtors for Citizens' costs and anticipated costs of defending the Alleged Claim; provided, however, (a) that the Debtors may obtain the discharge of such liens within (30) days after the date on which the Class One Claim has been paid in full (but in no event later than January 31, 1997, by delivering to Citizens (i) an irrevocable letter of credit (in form and substance reasonably acceptable by Citizens) issued for the benefit of Citizens by a reputable domestic commercial bank in the amount of $500,000 subject to being drawn by Citizens by presentation of a sworn statement that a court of competent jurisdiction has determined that Citizens has the right to recover costs or expenses (including, without limitations, attorneys' fees or expenses) incurred in*

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[1] Webster's New World Dictionary defines the meaning of the term "PROSECUTE" as follows: "1 to follow up or pursue (something) to a conclusion *[to prosecute a war with vigor]*; 2 to carry on; engage in; 3 a) to institute legal proceedings against, or conduct criminal proceedings in court against b) to try to get, enforce, etc. by legal process *[to prosecute a claim]*—vi. 1 to institute and carry on a legal suit 2 to act as persecutor"

connection with defense of the Alleged Claims in an amount equal to or greater than the amount of such draw, or (ii) a bond (in form and substance reasonably acceptable to Citizens) issued for the benefit of Citizens by a reputable domestic bonding or insurance company securing such possible right of recovery up to a sum of not less that $500,000 . . . At any time, the Debtor or the Consummation Agent may settle the Alleged Claims, subject to Court approval after notice to the Debtors and other parties in interest."

Citizens later represented to the state court that Bishay's claims against Citizens had been settled in the bankruptcy court, when Citizens knew they were not. Citizens also represented to the state court that it was entitled to draw the $500,000 Bishay had placed in escrow so that if after Bishay prosecuted his claims against Citizens he lost, Citizens would have been entitled to reimburse itself for the defense costs, according to Citizens and the bankruptcy court. This new practice may be found to be offensive to this Court, as it flies in the face of every citizen's right to freely prosecute his adversaries without having to put up $500,000 in an escrow account. The record below demonstrate that Bishay never had an opportunity to prosecute his claims, on the merits, as Citizens disingenuously represented to the state court that Bishay's claims had been settled in the bankruptcy court, when Citizens knew that they were not. Believing Citizens' representations (as Bishay's largest creditor at that time) the state court erroneously dismissed Bishay's claims on summary judgment. The district and the appeals courts herein mistakenly, also, concluded that Bishay was looking for a second bite at the apple, where Bishay, in fact, never had his first bite.

For all such obvious reasons, and the deep pocket theory employed by Citizens to date, Bishay petitions this Honorable Court, *pro se*, after running out of financial resources otherwise required to hire counsel to file the within Petition.

Both the district and the circuit courts appear to have mistakenly concluded that Bishay already had his day in court on the merits of his claims against Citizens, the crux of which is Citizens' refusal to *release its liens even after full repayment* of Bishay's debt in 1995—and the substantial personal and corporate damages Bishay suffered as result of such egregious acts. And unless this Honorable Court steps-in an reverses this new practice, which had been already permitted by the U.S. Bankruptcy Court for the District of Massachusetts and, in essence, has been sanctioned by the district and the circuit courts, lenders will have no reason to refrain from this new practice, henceforth; and millions of secured-loan borrowers could expect to confront the same ordeal Bishay faced in 1995 in this case, which wiped out his fortune—and left him begging this Court for intervention.

Citizens described this novel experiment, which indeed was adopted by the U.S. Bankruptcy Court for the District of Massachusetts, and now sanctioned (by default) by the U.S. Appeals Court for the First Circuit, as follows (Pet. App. 14a):

> *"This issue recently arose in an unreported case in the U.S. Bankruptcy Court for the District of Massachusetts. In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay, Nos. 95-15015 and 95-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96) (available from the authors). In that case, the court addressed the lender's request to retain certain of its liens even after full debt payment pursuant to the Chapter 11 plan proposed by the lender, where the borrower had previously asserted state court lender liability claims against the lender. Under the terms of the lender's plan, the borrower would repay all outstanding principal, interest, costs and expenses currently due to the lender and, as the borrower had refused to execute a release of its claims against the lender, the lender would retain its liens in order to secure payment of any costs that the lender*

would later incur defending the borrower's lender liability claims following confirmation. The borrower, of course, objected. In confirming the plan, the court held that, under the terms of the relevant loan documents[2]*, the lender's claim included the lender's future contingent costs in connection with the debtor's state claims against the lender. As a result, in order for the plan to be fair and equitable, the lender was entitled to retain liens on the debtor's property to secure those contingent claims in an amount sufficient to cover such contingent costs (which were estimated at $500,000)"*

Both the district and the circuit courts erroneously found that Bishay was looking for a second bite of the same apple; but the record confirms that Bishay never had the first bite, respecting the merits of his claims[3].

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[2] The record below, which contains the loan documents at issue, does not include a single document, which supports the proposition made by Citizens. The record below indeed includes standard language which permits the lender to look to the borrower for its "collection costs". And Bishay always contended that such costs in fact end on the day the loan is repaid; and the lender is not entitled to appropriate, or misappropriate, the borrower's equity in his/her property, well after the debt is repaid—and practically to fund future, hypothetical collection fees after no further collection efforts are required.

[3] All of Bishay's claims asserted against Citizens, including the issue discussed herein, which was Citizens' refusal to release its liens even after full repayment, were erroneously dismissed on summary judgment by a state court judge after Citizens disingenuously represented to that court that said claims were settled in the Bankruptcy Court, when Citizen knew they were not. Bishay's claims against Citizens also included the propriety (or lack thereof) of Citizens' strained interpretation of the typical *cost of collection* clause normally found in standard loan documents, including Citizens' specific loan documents presented to the bankruptcy court, which entitled Citizens to collect such fees as part of the total amount due and owing at the time the debt is fully repaid. There was not a shred of evidence to support the strained proposition Citizens advanced, which would have obligated Bishay to pay Citizens fees or costs after the debt in question was paid in full. Bishay, therefore, challenges Citizens to

A debtor who files for Chapter 11 bankruptcy notifies his creditors and the bankruptcy court of all assets he owns, including any lawsuits he may file against his creditors. See, *e.g.*, *Oneida Motor Freight, Inc.* v. *United Jersey Bank*, 848 F.2d 414, 416 (CA3 1988). When the bankruptcy court confirms a plan of reorganization, the order of confirmation is a binding judgment that, by default, is *res judicata* with respect to claims between the debtor and the creditors. See, *e.g.*, *Katchen* v. *Landy*, 382 U.S. 323, 334 (1966). In some cases, litigating all such claims in the bankruptcy court would take years. In order to expedite the process of Chapter 11 reorganization, Congress accordingly enacted a statute permitting a debtor to reserve his/her claims for litigation after the bankruptcy plan is confirmed: "[A] plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3)(B). In this case, the creditor (Citizens Bank) itself drafted the plan's reservation clause: *"The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')."* The bankruptcy court approved the plan, including the reservation clause, and ordered the debtor (petitioner Bishay) to post $500,000 as security for costs Citizens might incur in defending against those claims. The District Court, and later the Appeals Court, nonetheless held

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show this Court, in its expected opposition to this Petition, that Citizens has any documents, which Bishay executed, that remotely suggest that Citizens was entitled to collect fees or costs after the loan at issue was repaid in full—or otherwise entitled Citizens to retain its liens on Bishay's assets, prospectively—and is precisely the reason Citizens' counsel in that case posed the question: *May a Secured Lender Refuse to Release Its Liens Even After Repayment*—because Citizens' loan documents did not afford it the right to launch such an experiment or pose this novel question, after it successfully managed to catastrophically devastate Bishay.

that Bishay was not entitled to assert a breach of contract claim against Citizens even after Bishay met his end of the bargain by putting up the additional $500,000 to do just that (prosecute his claim against Citizens), and Citizens abrogated said agreement by representing to the state court that Bishay's claims had already been settled in the bankruptcy court, when Citizens knew they were not.

1. Petitioner Bahig Bishay owned a business in East Walpole, Massachusetts that sold, leased, and serviced luxury cars. Bishay who had been an evergreen[4] customer of Neworld Bank, with good standing, over a twenty year period, in 1988 borrowed for his business $2.5 million from Neworld Bank; and from 1989 through 1994 Bishay entered into a series of agreements with Neworld regarding the timing for repaying the loan. [Record below]. Respondent Citizens Bank bought Neworld in April 1994 and immediately changed the course of dealing with Bishay and other customers and demanded full repayment of all such loans. Shortly thereafter, Bishay reduced his loan by approximately $1.0 million, and in the process of repaying the entire remaining balance of approximately $1.5 million, Bishay requested Citizens to prepare the standard lien releases respecting Bishay's $20.0 million in assets he had pledged to secure his loan. In the summer of 1995 Citizens' loan officers, however, advised Bishay that they were directed by the executives of the bank to demand a "*general release*" in addition to the full repayment. This, Citizens was not entitled to do under the loan documents. Citizens filed suit against

[4] Evergreen was a term used in the banking community during the relevant time frame, where "preferred" clients, such as Bishay, who possessed high credit rating; and placed with the lending institution more than sufficient cash or other assets to secure the credit facilities offered by the various banks at that time, including Revolving Lines of Credit, were referred to as "evergreen clients" and/or "evergreen lines of credit." This category of lines of credit were automatically renewed one year after the next, hence the definition "evergreen".

Bishay in the state court and alleged that Bishay defaulted on his obligations, knowing that Bishay had initially paid Citizens $300,000 and later paid another $700,000—leaving a balance of approximately $1.5 million, which was still secured by assets valued at more than thirteen times the loan balance (known as 13:1 LTV). Citizens also used private information it learned from Bishay to try to acquire for itself a property about which Bishay was negotiating with the FDIC. As a result of Citizens' actions, which prevented Bishay from repaying the remaining balance of his loan (after Citizens refused to prepare standard lien releases because it wanted to retain liens on Bishay's properties, indefinitely, or at least until such time Bishay executed a "general release", in addition to full repayment), Bishay's business enterprise was severely damaged. Then Citizens sued Bishay alleging he had breached his loan agreement, and in the summer of 1995 Bishay filed an answer containing a counterclaim that alleged (1) a breach by Citizens of its duty of good faith and fair dealing, and (2) unfair trade practices by Citizens under Massachusetts General Laws Chapter 93A. [Record below]. Due to Citizens' repeated threats to foreclose on Bishay's more than $20.0 million in assets, and auction them off because Bishay refused to execute the general release Citizens demanded, Bishay sought Chapter 11 bankruptcy protection to stop Citizens' unjustified aggression.

Although Bishay was willing and able to pay his creditors—and indeed repaid *every* creditor *in full* in 1996—he was compelled to file for Chapter 11 bankruptcy to protect himself against the actions of Citizens that were preventing him from running his business. [Record below]. Bishay again attempted to pay Citizens in full, but Citizens refused to release its liens even after full repayment, demanding that Bishay also release all of his claims against Citizens before Citizens would release its liens on Bishay's properties. Bishay refused the demand for a general release, in addition to the full repayment, and in October 1995 Bishay gave

Citizens a list of additional claims that he intended to pursue against the bank and notified Citizens that he would amend his previously filed counterclaims to include the additional claims. The amending of Bishay's list of claims against Citizens was approved by both the state and the bankruptcy courts in 1996. [Record below].

Citizens filed a third-party plan of reorganization in the Bishay Chapter 11 proceeding. [Record below]. This plan initially sought to extinguish Bishay's claims against the bank by providing that Citizens would pay Bishay $10 (Ten Dollars) in return for the release of "all claims." The Chapter 11 Trustee informed Citizens of his intention to oppose the plan on the ground that its failure to preserve those litigation rights made the plan unconfirmable. In response, Citizens modified its proposed plan by replacing the claim-extinguishing clause with the claim-preserving clause, which is heart of this case: *"The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')."* On July 31, 1996, the bankruptcy court issued an order appointing Bishay as the *"authorized representative"* of his estate. [Record below]

Neither the plan of reorganization nor the order of confirmation determined the extent to which Bishay's debt to Citizens was enforceable. To the contrary, the plan—which, as noted, Citizens itself had drafted—required Bishay to pay the debt to Citizens only "until and unless" those obligations were reduced by an offsetting judgment obtained by Bishay against Citizens in the pending state court litigation. The plan accordingly characterized Citizens' claims against Bishay as "impaired," whereas it characterized the claims of all other creditors as "unimpaired." Citizens further acknowledged Bishay's preserved claims by demanding that the bankruptcy court require Bishay to post the extraordinary sum of

$500,000 as security for the costs Citizens might incur in defending itself against those claims—which is the subject of the propriety (or lack thereof) of any liens or cash security that must be placed in escrow in order to permit a borrower to freely assert his/her claims against his/her lender? In its request, Citizens referred, specifically, to Bishay's itemized list of claims and described the claims as "wide-ranging." Citizens also acknowledged these claims, and petitioner's retention of them, in its Disclosure Statement. [Record below]

The bankruptcy court approved Citizens' proposed plan on April 23, 1996. [Record below]. The confirmed plan reserved Bishay's right to "prosecute [his] alleged claims against Citizens" on the condition that Bishay post the $500,000 as security for Citizens' defense of those claims. Bishay complied with the order by posting the $500,000.

2. In June 1996, Citizens filed a motion in Massachusetts Superior Court for summary judgment with respect to Bishay's two-count counterclaim; and Bishay moved to amend his answer and counterclaim. The court granted Bishay's request, and it denied Citizens' motion "without prejudice to renew it as to the amended answer and counterclaim." [Record below] Bishay accordingly amended his counterclaim to include six counts, all of which were on the list that he had sent Citizens in October 1995: the two original counts, along with promissory estoppel, intentional interference with contractual and advantageous relations, request for declaratory relief with respect to the validity of a Forbearance Agreement, and intentional infliction of emotional distress.

Citizens then moved for summary judgment with respect to the four counterclaims that had not been contained in Bishay's original answer, arguing that those counterclaims were barred by the doctrine of *res judicata*; and that said claims were already settled in the bankruptcy court, which Citizens knew they were not. [Record below]. Bishay responded that the plan expressly reserved his claims and

ordered him to pay Citizens only "unless and until" Bishay obtained a favorable judgment against Citizens in the state court litigation.

The Superior Court rejected Bishay's argument and adopted Citizens', notwithstanding that Citizens knew that its representations were false. The state court wrote the following:

> *"[C]citizens first contends that it is entitled to judgment as a matter of law on the ground that most of Bishay's counterclaims are precluded by the Bankruptcy Court's April 23, 1996 Confirmation Order. The doctrine of prior adjudication has two aspects. Res judicata, or claim preclusion, dictates that a valid and final judgment rendered by a court of competent jurisdiction bars relitigation between the same parties of any claim that was or might have been raised with respect to the subject matter of the prior litigation . . ."* [Record below].

3. After an unsuccessful appeal Bishay filed with Massachusetts Appeals Court, in 1999 Bishay filed a "breach of contract" action (not asserted in the earlier state court case) with the US District Court, District of Massachusetts. The crux of Bishay's new cause of action is that based on the specific agreement confirmed by the bankruptcy court, which required Bishay, on one hand, to put up $500,000 in order to freely prosecute his claims against Citizens (with no limitation on what was asserted prior to the bankruptcy, and what was later added during the bankruptcy). Having put up the additional $500,000 in cash in order to freely prosecute his claims against Citizens, Bishay argued that he was entitled to a finding by the district court that Citizens breached the agreement with him, which had been approved by the bankruptcy court. Bishay also argued that the actual breach was completed and became actionable once Citizens drew against $500,000 in 1999, which Bishay had placed in escrow so that he would freely prosecute all of his claims as agreed-

to by Citizens. In other words, Citizens' breach foreclosed Bishay from enjoying the fruits of the contract at issue, albeit unfair on its face, as no one should be ordered by any court to put up $500,000 in order to be granted the right to assert a legitimate claim against his/her lender.

REASONS FOR GRANTING THE WRIT

If this case-law now at bar endures, Citizens and other secured-lenders will, if they have not already, refuse to release their liens even after full repayment. This would, if it has not already, create tremendous imbalance between borrowers and lenders and, essentially, would foreclose borrowers from being able to freely refinance or sell their respective properties[5].

To avoid manifested injustice for multitudes of secured-loan borrowers for years to come, this Honorable Court must (1) settle the issue raised by Citizens, and that is: *May a Secured Lender Refuse to Release Its Liens Even After Repayment?;* and (2) reverse the judgment issued by the US Court of Appeals for the First Circuit, and allow Bishay, once and for all, to prosecute his rightful claims against Citizens.

This new practice, now the case-law at bar, and if it endures, arguably, would: (1) foreclose multitudes of secured-loan borrowers from asserting claims against their respective lenders in cases of fraud on the part of the lender; (2) allow a lender to leverage this new power to extort a general release to which the lender is otherwise not entitled, as demonstrated in the case at bar; (3) permit secured-lenders to charge their borrowers unconscionable interest rates, fees or other charges, for example, knowing that the borrower would not be permitted to challenge such acts because the lender con-

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[5] Real properties must first be made free and clear in order to pledge the same to a new lender, often based on more favorable terms or rates; or sold and conveyed to a new owner.

trols the equity in the respective property, as Citizens demonstrated in the case at bar; and (4) subject borrowers to face the only ultimatums: (i) to give up their constitutional right to *due process* (Fifth Amendment) and become restrained from suing the lender, or (ii) lose the equity in the respective property to the lender so the lender, Citizens in the case at bar, would appropriate such equity to fund its future defense cost, even after full repayment of the loan, as manifested herein. The most fundamental question upon which this Court must cogitate is whether such new practice should endure under any theory, scenario or circumstance—and whether a borrower should be held besieged by his/her lender or be forced to execute a general release not required by the respective loan agreement—in addition to the full repayment of the respective debt?

The below courts violated 11 U.S.C. 1123(b)(3)(B) (by default) by adopting a *per se* rule against enforcing any clause, in a Chapter 11 plan, that reserves all of a debtor's claims against a particular creditor. The decision below (by default) not only reads Section 1123(b)(3)(B) out of the Bankruptcy Code but also reads the reservation clause out of the confirmed plan. In this case, the rule worked a particularly manifest injustice because the creditor itself had drafted the clause and was acutely aware of Bishay's intention to pursue claims he had not yet filed but made abundantly known to the lender. Moreover, the rule destroys the purpose for which Section 1123(b)(3)(B) was enacted, because it forces debtors to prolong federal bankruptcy proceedings—sometimes for years—while all claims are litigated before the bankruptcy court. The decision of the below courts, in essence, sanctions the lender's herein, Citizens, new policy, which has already, and erroneously, been adopted by the bankruptcy court more than ten years ago, and is expected

to have been followed by multitudes of other ruthless lenders, if not Citizens itself during this period.

I. Certiorari is warranted because Citizens reported that there is a genuine split in federal and state courts insofar as the propriety (or lack thereof) of a lien retention well after the debt is repaid.

II. A favorable resolution by this Court would put to rest further debates and speculations introduced by secured-lenders in state and federal courts, and would spare multitudes of borrowers from losing control of their real property and related equity.

First, the decision below contradicts the express command of Congress that "a plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3).

Second, the below courts violated a core principle of contract interpretation. "Because a [bankruptcy] plan is often more akin to a contract than a disputed order, general contract principles ought to be applied to its interpretation." *UNR Indus., Inc.* v. *Bloomington Factory Workers*, 173 B.R. 149, 157 (Bankr. N.D. Ill. 1994); see also *Cohen*, 279 B.R. at 160; *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 592 (D. Del. 2002). This Court has recognized the "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The below courts violated this rule by dismissing Bishay's contract claim, which Bishay timely filed (for the first time) in the district court.

Third, the below courts violated "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62. Bishay's reservation clause is clear and unambiguous; but even if it were not, its ambig-

uities should be resolved against the drafter—Citizens. In *Peltz*, the court enforced such a clause because, *inter alia*, "[p]rior to a plan's confirmation, creditors have the opportunity to examine the terms of the proposed plan and respond accordingly." 280 B.R. at 592. In *Bishay*, the argument for giving effect to the clause is even stronger because Citizens actually drafted it.

The dismissal of Bishay's contract claim is all the more difficult to justify in light of the fact that Citizens itself viewed the clause as preserving all of Bishay's claims. Citizens left the clause out of the plan it proposed initially, but "the Chapter 11 Trustee [would] not support [that] plan because * * * he believe[d] it's unconfirmable due to the treatment of Bishay's claims against Citizens (i.e. they are extinguished)." Memo of R.M. Barry to Citizens Bank of 3/13/96. [Record below]. Fearing that if "the Trustee oppose[d] Citizens' plan, it might be difficult for the judge to confirm the plan," Citizens concluded that it "shouldn't jeopardize confirmation of our plan over the settlement of Bishay's claims." [Record below]. Citizens thus understood perfectly that the modified plan it submitted would leave the bank "defending against Bishay's claims." [Record below]. Citizens acknowledged in its Disclosure Statement that those claims included the ones on the comprehensive itemized list that Bishay had given Citizens in October 1995. Indeed, the bankruptcy court ordered Bishay to post $500,000 as security for costs Citizens might incur in defending against Bishay's claims.[6] Citizens included the reservation clause as part of the typical strategic decisionmaking or bargained-for exchange that is characteristic of contract formation. The U.S.

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[6] Based on Citizens' representation that Bishay's claims had been settled in the bankruptcy court, when Citizens knew they were not, the state court inexplicably awarded $430,000 out of the $500,000 to Citizens while prohibiting Bishay from bringing the very claims for which the money was earmarked as a defense fund.

Appeals Court unjustifiably interfered with that process to protect a party that needed no protection—the creditor/drafter.

In this case, Citizens knew precisely which claims Bishay intended to make, because Bishay had notified it of those very claims in his letter of October 1995 (containing the itemized list of claims). Citizens convinced the bankruptcy court to order Bishay to set aside $500,000 for Citizens' legal fees in defending those claims. Citizens thus knew, at the time the bankruptcy plan was confirmed, precisely the litigation prospects it faced. This set of circumstances occurs often in cases involving general reservation clauses: The creditor understands the scope of the claims it faces because it is intimately familiar with the details of its own conduct (or misconduct).

Finally, there is no merit in the below courts suggestion that the four counts Bishay added to his counterclaim after confirmation were necessarily adjudicated by the bankruptcy court's order. The bankruptcy court provided precisely the opposite. The plan that the bankruptcy court confirmed characterized Citizens' claims against Bishay as "impaired" by Bishay's reserved claims and decreed that Bishay had to pay Citizens only "until and unless" his obligations were reduced by an offsetting judgment against Citizens in the pending state court litigation. Even the Massachusetts Superior Court acknowledged that the bankruptcy court had issued an order appointing Bishay as representative of the debtor's estate so as to permit him to "pursue the present litigation." Neither Citizens nor the courts below can offer any explanation why the bankruptcy court would order Bishay to set aside $500,000 for Citizens' defense costs if that court believed the bank would have to defend only the two pre-confirmation counts of

Bishay's counterclaim—something that would run no more than fifty thousand dollars; and not Half a Million Dollars[7].

The issues presented here are vital to the economical welfare of every borrower, debtor, and the administration of the bankruptcy system at large. "Obviously, if it is necessary to identify completely and disclose the intent with regard to each avoidance action in order to preserve it properly, then the Bankruptcy Code's goal of a quick and orderly confirmation may be substantially derailed." Vines & Teofan, 12 Bankr. Dev. J. at 761. The reason is that "the confirmation process is expedited by allowing debtors to include a general reservation of their right to pursue certain causes of action at a later date." *Cohen*, 279 B.R. at 159; see also *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997). The federal bankruptcy court in *Cohen* gave a detailed explanation of the problem:

> [I]n large chapter 11 cases, the investigation and litigation of all possible avoidance actions to final judgment can take years. To force the debtor to remain in bankruptcy until a final determination of all possible preference actions is made would act as a detriment to both the debtor and its creditors by slowing down the reorganization process. In most of the large Chapter 11 cases in this Court, the plan of reorganization and/or liquidation is often confirmed before the debtor and/or a trustee has undertaken a detailed investigation of the potential preference actions. In large Chapter 11 cases there may be hundreds or even thousands of transaction[s] within the 90-day period and considerable time and effort is needed to examine those transactions in light of the numerous defenses provided for in § 547(c). More often than not, it is appropriate to delay that undertaking until after plan confirmation.

279 B.R. at 159; see also *Peltz*, 280 B.R. at 591.

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[7] Excluding the additional fees and costs Bishay incurred with his own attorneys.

"[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action." *Acequia, Inc.* v. *Clinton*, 34 F.3d 800, 808 (CA9 1994)). "Clearly, it is not always possible to complete an investigation of a potential preference action prior to what might otherwise be the appropriate time to seek confirmation." Vines & Teofan, 12 Bankr. Dev. J. at 761. As in ordinary civil litigation, a party to a bankruptcy proceeding may not be able to learn of all potential claims until the process of discovery has begun. Prohibiting debtors from reserving all claims thus creates the injustice of extinguishing claims the debtor *could not* have identified specifically at the time the plan was confirmed.

For this reason, parties to a bankruptcy proceeding cannot use clever drafting to escape the problem created by the lower courts *per se* rule. Even a debtor aware of the rule would know that he/she might well be unable to identify, before completing an investigation, every claim he/she possesses against a creditor. As a result, the debtor's only recourse is to litigate and investigate all claims fully before the bankruptcy court confirms the plan. This is precisely the outcome that Congress enacted Section 1123(b)(3)(B) to avoid.

The below decisions thus impose a hefty burden upon the federal bankruptcy courts. In *every* Chapter 11 case, the debtor will potentially have claims he could pursue against a creditor. The *per se* rule adopted in *Bishay* forces all such debtors to drag out the bankruptcy proceedings—delaying the date that creditors are repaid, that the reorganized debtor can start anew, and that the bankruptcy court can move on to other cases—while they investigate as many potential claims as they can manage to foresee.

Certiorari is accordingly warranted in order to: (a) put to rest the conflict reported by the lender herein; and (b) allow Bishay to prosecute his long-awaited claims so that the prac-

tice of *refusing to release a lien even after repayment* would endure no more, and the proper signal would reach every secured lender doing business in the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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